86-2056

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THEODORE L. MALATESTA,

Petitioner,

vs.

COURT OF APPEALS OF THE
STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether it is permissible under the due process and equal protection clauses of the Constitution of the United States for the Supreme Court of the State of New York, Appellate Division, First Judicial Department, to create and enforce an automatic presumption of unfitness to practice law against every attorney found to have commingled or to have failed to have maintained the uninterrupted integrity of escrow funds, regardless of context, motive, or effect and regardless of the failure of confrontation with the complainant.

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Theodore L. Malatesta petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 124 A.D.2d 62 (1st Dept. 1987) and is annexed as Appendix A. The opinion of the Court of Appeals of the State of New York is annexed hereto as Appendix B.

JURISDICTION

The order of the New York Court of Appeals denying petitioner's motion for leave to appeal the decision of the Appellate Division, First Judicial Department, disbarring him was entered on March 24, 1987. See Appendix B. This petition for certiorari has been filed in this Court within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

22 N.Y.C.R.R. § 603.15(a) provides in pertinent part:

> An attorney in possession of any asset or sum of money belonging to a client is a fiduciary and must not commingle client funds with his own funds or personal or business accounts. An attorney shall maintain in a bank or trust company within the State of New York in his own name . . . a special account or accounts, separate from his personal accounts or from any accounts in which assets belonging to his firm are deposited, and separate from any accounts which may be maintained in the capacity of executor, guardian, trustee, or receiver, into which special account or accounts all funds entrusted to such attorney or such firm shall be deposited.

Disciplinary Rule [hereinafter "DR"] 9-102(A) provides:

> All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

STATEMENT OF THE CASE

On December 15, 1982 the Departmental Disciplinary Committee for the First Judicial Department [hereinafter "Disciplinary Committee"] served a complaint upon Theodore L. Malatesta, the Petitioner, and requested a reply thereto. The complaint was instigated by Gloria Sparber, a former client of the Petitioner, and alleged, *inter alia*, that Petitioner had settled a case for Ms. Sparber without her consent and had failed to disburse settlement funds to her.[1] Soon after Petitioner submitted his reply to the complaint, in which he admitted signing Ms. Sparber's name on a release and settlement check based upon the express terms of a retainer agreement with her, he agreed to and did appear before the Disciplinary Committee.

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[1] Ms. Sparber filed the complaint on the very day she had in fact received a check for $2,500 from Mr. Malatesta covering her share of the settlement proceeds. Ms. Sparber's allegation of nonpayment was not pursued by the Disciplinary Committee.

Mr. Malatesta also provided the Disciplinary Committee with full financial records as requested by it.

On or about June 4, 1985, the Disciplinary Committee served Petitioner with a notice of charges alleging professional misconduct. On November 6, 1985, by a pre-hearing stipulation, the Disciplinary Committee represented that Gloria Sparber would appear as a witness at the Departmental disciplinary hearings. The Committee did not notify Mr. Malatesta that Ms. Sparber was not appearing because she had disappeared and that the Committee had been unable to find her since ~~as long ago~~ as 1983 until directly questioned by Mr. Malatesta's counsel at the hearing. The record at the hearing also established that the Disciplinary Committee was unable to depose Ms. Sparber or obtain any information from her other than an unsworn complaint and "reply" in a handwriting different from that in the complaint.[2]

After a hearing and investigation in which Mr. Malatesta fully cooperated, the Disciplinary Committee Hearing Panel sustained a finding of professional misconduct with regard to Petitioner's handling of the Sparber settlement [Charge Two] and with regard to two other matters [Charges One and Four]. On the Sparber matter, the absence of the complainant was ignored and her unavailability for cross-examination, although complained of, disregarded. With regard to Charge One, the Panel found that Petitioner had deposited a $4,200 check from William and Marilyn Cassin into his escrow account in April of 1982, let the amount in the account fall below $4,200 in May of 1982, and then returned the $4,200 to the Cassins in June of 1982. With regard to Charge Four, the Panel found that in 1982 Petitioner had deposited two checks, one from a personal insurance claim and another from his own personal injury claim, into his escrow account. Petitioner candidly admitted depositing these checks into his escrow account, stating that he acted as his own

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[2] An independent investigation of Ms. Sparber in 1983 disclosed that she had a criminal record, was known under several different names and Social Security numbers, and had a history of disappearing from sight after accruing large debts.

attorney in handling both matters. The Panel dismissed a fourth charge alleging that Petitioner had violated various Disciplinary Rules by issuing two escrow checks returned for insufficient funds, finding that insufficient evidence had been produced to show that issuance of the checks constituted dishonesty or fraud.

On September 19, 1986, a divided Hearing Panel recommended the disbarment of Petitioner based virtually exclusively upon Petitioner's alleged misappropriation of client funds. While acknowledging that Petitioner had presented evidence in mitigation of this offense,[3] namely evidence of severe psychological, physical, and financial stress at the time of the alleged misconduct, the Panel found itself, without addressing Petitioner's assertion of his due process right to be confronted by the complainant, "constrained" to recommend disbarment due to the "well established presumption [in the First Judicial Department] that an attorney who misappropriates funds held by him in trust is unfit to remain a member of the bar." Central to this presumption, according to the Panel, was language from the First Department's decision in *Matter of Marks,* 72 A.D.2d 399 (1st Dept. 1980), citing *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (N.J. 1979), for the proposition that careless handling of client funds is *per se* sufficient ground for disbarment, regardless of injury or loss to anyone and regardless of motive.

On November 8, 1985, the Disciplinary Committee submitted a notice of petition to the Appellate Division, First Judicial Department [hereinafter "Appellate Division"] seeking discipline of Petitioner. On February 5, 1987, the Appellate Division granted the Disciplinary Committee's petition and ordered Petitioner disbarred from practice as an attorney in New York effective March 5, 1987. In its opinion, the Appellate Division followed the reasoning of the Disciplinary Committee Hearing Panel, citing *Matter of Marks, supra,* and its progeny as controlling in the First Department and establishing that "[a]n attorney who misappropriates funds is presumptively unfit to

[3] Indeed, it was in light of this mitigating evidence that one panel member broke with the majority and found that a lesser sanction, such as a three-year suspension, was the appropriate level of punishment in this case.

practice law." Appendix A. The Appellate Division, in ordering disbarment, disregarded Mr. Malatesta's otherwise unblemished record of over twenty-five years[4] as well as Mr. Malatesta's claims that the acts of misappropriation [from which he in no way profited] were the result of good faith mistake and naïveté and were related to the physical, mental, and financial traumas he was experiencing during this period. The Appellate Division made no determination whatsoever about Mr. Malatesta's present moral or professional fitness to practice law. Although the issue of violations of federal due process was briefed by Petitioner's counsel below, the Appellate Division ignored all such issues and implicitly overruled them. See, generally, Exhibit A.

On February 26, 1987, Judge Richard Simon of the Court of Appeals of the State of New York [hereinafter "Court of Appeals"] signed an order to show cause staying the order of the Appellate Division pending determination by the Court of Appeals of Petitioner's motion for leave to appeal. On March 24, 1987, the Court of Appeals issued its order denying Petitioner's motion for leave to appeal and dismissing Petitioner's motion for a stay of the order of the Appellate Division. See Appendix B. On April 3, 1987, Petitioner's application to this Court to stay enforcement of the judgment of the Court of Appeals of the State of New York was denied.

REASONS FOR GRANTING THE WRIT

I. The New York Court of Appeals, by Denying Leave to Appeal, Let Stand a Decision Relying on a Presumption in Conflict with the Constitution of the United States and the Decisions of this Court.

As this Court has consistently held, a state "cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection clauses of the Fourteenth Amendment." *Schware v. Board of Bar*

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[4] No complaints were ever filed against Mr. Malatesta arising out of matters during any years since 1982.

Examiners, 353 U.S. 232, 238-39 (1957); *see also*, *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963). Especially because an adverse determination in this area prevents an individual from earning a living in the profession for which he or she has trained, a "deprivation" with "grave consequences," *Konigsberg v. State Bar of California*, 353 U.S. 252, 258 (1957), determinations concerning one's ability to practice law require strict adherence to all requirements of due process and equal protection. *Id.* Indeed, proceedings which may lead to disbarment are more closely analogous to criminal proceedings than to ordinary civil proceedings. *Cf. Konigsberg v. State Bar of California*, 353 U.S. at 258. For this reason, the Court requires that the burden of proving the elements necessary to an adverse determination be placed on the state, including elements relating to character and intent. *See, e.g., Patterson v. New York*, 432 U.S. 197 (1977); *cf. Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

In *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), this Court held that a person may not be excused from bar admission unless he lacks good character or is professionally unfit. The Court held that ignoring such traits in evaluating qualifications for bar membership violates the Due Process Clause of the Fourteenth Amendment. Thus, after granting certiorari to review a state judgment excluding an individual from bar membership, the Court reversed the decision and remanded the case, finding that the state had presented insufficient evidence of "moral turpitude" on the part of the applicant. The Court stressed that "[i]n light of petitioner's forceful showing of good moral character, the evidence upon which the State relies . . . cannot be said to raise substantial doubts about his present and good moral character" warranting denial of admission. 353 U.S. at 246.

This Court has consistently required that some degree of fault or venality be proved before a judicially ordered forfeiture of property or liberty is granted. Just as the Court required a showing of moral turpitude prior to denial of bar admission in *Schware v. Board of Bar Examiners, supra, see also, Willner*

v. Committee on Character and Fitness, 373 U.S. 96 (1963), it struck down a Georgia motor vehicle provision requiring temporary license suspension of all uninsured motorists involved in an accident in *Bell v. Burson*, 402 U.S. 535 (1971). Justice Brennan, writing for a unanimous Court including four Justices now sitting, reviewed the statute on certiorari and found it violative of the Due Process clause of the Fourteenth Amendment because it granted no real hearing on the issue of the motorist's fault. *Id.* Likewise, in the criminal context, this Court has uniformly condemned presumptions of criminal wrongdoing based on actions alone rather than on evidence of evil intent. *See, e.g., Morissette v. United States*, 342 U.S. 246 (1952) [conclusive presumption that any knowing taking of property is sufficient to prove a finding of larcency, regardless of criminal intent, violates Due Process clause]; *Sandstrom v. Montana*, 442 U.S. 510 (1979) [presumption of "knowing" or "deliberate" homicide where one person kills another violative of due process]; *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) [presumption of wrongful intent to violate antitrust laws based only on evidence of an effect on prices violates due process].

The New York Court of Appeals, by its denial of Theodore Malatesta's motion for leave to appeal, let stand an appellate court order disbarring him because of that court's acknowledged "presumption" that an attorney who misappropriates funds for *any* reason and under *any* set of circumstances is unfit to practice law. As in *Matter of Marks*, 72 A.D.2d 399 (1st Dept. 1980), upon which it relied, the Appellate Division erroneously refused to evaluate the mitigating factors relevant to any consideration of Mr. Malatesta's intent at the time the misappropriations occurred. The Court of Appeals thus upheld a presumption of professional unfitness to practice law without requiring any showing of bad intent, presuming moral turpitude from the fact of "knowing" misappropriation alone. This type of presumption is constitutionally infirm, whether it is viewed as conclusive [*Morissette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978)] *or* as a mere shifting of the burden of proof or persuasion, *i.e.*, a rebuttable

presumption [*Patterson v. New York*, 432 U.S. 197 (1977); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970)].

The New York Court of Appeals' affirmance of the presumption that petitioner acted with corrupt knowledge and its acceptance of the presumption that *any* misappropriation by petitioner rendered him unfit to practice law are no substitutes for the requirement under the Due Process Clause of the Fourteenth Amendment that the court carefully and seriously evaluate petitioner's *current* fitness and character, *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), and his actual state of mind at the time the misappropriations occurred, *Morissette v. United States, supra; cf. Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1866) [Court condemned *ex post facto* disbarment of attorneys who had supported the Confederacy]. "The power to create presumptions is not a means of escape from constitutional restrictions." *Speiser v. Randall*, 357 U.S. 513 (1958), citing *Bailey v. Alabama*, 219 U.S. 219 (1911). The Court of Appeals' failure to evaluate petitioner's misappropriations in light of the surrounding circumstances affecting his state of mind and in light of his current character and fitness contravenes the well established holdings of this Court, *see, e.g., Schware v. Board of Bar Examiners, supra; Morissette v. United States, supra*, and warrants this Court's review on certiorari of the Court of Appeals decision.

II. The Unconstitutional Presumption at Issue in this Case is One Being Adopted by an Increasing Number of States and Thus must be Reviewed by this Court.

While the existence in even one state of a presumption of unfitness to practice law based on a misappropriation without requirement of any wrongful intent warrants this Court's intervention, the importance of reviewing such a constitutional infirmity is magnified by the fact that an ever increasing number of states are adopting this approach. As noted previously, *see* p. 5, *supra*, the New York courts rely on New Jersey's presumption of *per se* unfitness where a misappropriation exists. *See, e.g., Matter of Marks, supra*, citing *In re Wilson*, 81 N.J. 451,

409 A.2d 1153 (N.J. 1979). Other jurisdictions which have accepted this same rule subsequent to *Wilson* and *Marks* include Maryland [*Attorney Grievance Committee v. Goldberg*, 307 Md. 546, 515 A.2d 765 (Md. 1986)], the District of Columbia [*In re Harrison*, 461 A.2d 1034 (D.C. 1983)], Oklahoma [*Oklahoma Bar Association v. Raskin*, 642 P.2d 262 (Okla. 1982)], Minnesota [*In re Okerman*, 310 N.W.2d 568 (Minn. 1981)], and Maine and Texas [unpublished decisions noted in Johnson, "Lawyer, Thou Shall Not Steal," 36 Rutgers L. Rev. 454, 486 (1984)].

This Court has not hesitated to grant certiorari to correct substantial constitutional errors in the context of attorney admission and discipline. In *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), this Court reversed a state denial of bar admission because the lower court had failed to prove that petitioner was "morally unfit to practice law." In *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), this Court on certiorari reversed a state's denial of bar admission, holding that petitioner was deprived of a fair opportunity to prove his character and fitness. In *Spevak v. Klein*, 385 U.S. 511 (1967), this Court on certiorari to the New York Court of Appeals reversed a disbarment based on an attorney's assertion of the Fifth Amendment. *See also Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), discussed at pp. 6-8, *supra*, and *In re Ruffalo*, 390 U.S. 544 (1968) [failure to provide notice to attorney in state disbarment proceedings that employment of certain person would be a disbarment offense amounts to unconstitutional denial of due process]. Certiorari should likewise be granted to stem a nationwide trend which violates the due process rights of attorneys by presuming corrupt intent and mandating disbarment by the isolated fact of misappropriation alone, regardless of motive, effect, and context.

III. This Court should Review this Case Because it Concerns a Presumption which Applies only to New York Attorneys, like Petitioner, who Maintain Offices within the First *Department and thus Denies Equal Protection of the Law to Such Attorneys.*

This Court held in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), that a state may not exclude a person from the practice of law in a manner or for reasons which contravene the equal protection clause of the Fourteenth Amendment. Currently in New York State, the same or similar professional infractions by attorneys are sanctioned quite differently depending solely upon the geographic location of the attorney's office. As the Appellate Division, First Department, admitted in *Matter of Walker*, 113 A.D.2d 254 (1st Dept. 1985), "complaints about attorneys are processed differently, and sanctions for similar misconduct vary significantly, among and even within the four Departments of the Appellate Division." 113 A.D.2d at 256. Thus, an attorney like Petitioner who maintains an office in Manhattan is disbarred for failing to maintain the uninterrupted integrity of escrow funds, 124 A.D.2d 62 (1st Dept. 1987); *see also Matter of Levine*, 101 A.D.2d 49, 50 (1st Dept. 1984); *Matter of Marks*, 72 A.D.2d 399 (1st Dept. 1980), while an attorney with an office in Brooklyn or Queens guilty of the *same* (or even a more serious) infraction receives no greater sanction than censure, especially where, as was true in Petitioner's case, mitigating factors exist. *See, e.g., Matter of Reardon*, 76 A.D.2d 347 (2nd Dept. 1980); *Matter of Rukeyser*, 82 A.D.2d 589 (2nd Dept. 1981); *Matter of Goldman*, 82 A.D.2d 574 (2nd Dept. 1981). While the Constitution does not require identical procedures or identical sanctions by courts within the same state for the same infractions, it does mandate that similarly situated individuals *not* be treated in vastly disproportionate ways based on arbitrary considerations such as geographic location within a city or state. *Cf. Williams v. Illinois*, 399 U.S. 235 (1970) [state practice of confining only certain prisoners beyond the maximum statutory term based upon financial considerations held violative of equal protection]; *McLaughlin v. Florida*, 379 U.S. 184 (1964) [state law punishing interracial couples guilty of

cohabitation but not couples of the same race guilty of the same offense held violative of equal protection]. As this Court stated in the decision of *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

In light of the acknowledged and egregious disparity of punishment for the same and similar improprieties among the Appellate Divisions of New York State, which disparity led to the severe sanction of disbarment of Petitioner for conduct which would only have warranted censure in other Boroughs of New York City or Counties of New York State, this Court should grant a writ of certiorari. Only by doing so can it correct a denial of equal protection whereby in only *one* Appellate Division attorneys are almost automatically presumed professionally unfit and subject to disbarment should they misappropriate funds for any reason and under any circumstance.

IV. This Case Presents an Opportunity for this Court to Correct Due Process Violations Committed Below with Respect to the Availability of a Necessary Witness.

As this Court has held, the essential requirements of any bar disciplinary proceeding are "notice and the opportunity to be heard" with regard to all charges and all evidence presented. *In re Ruffalo*, 390 U.S. 544 (1967). Under due process principles, for notice to be adequate it must be given sufficiently before any hearing to permit the party against whom a proceeding is brought an adequate opportunity to prepare a response. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539 (1974). In Mr. Malatesta's case, the crux of the charges sustained against him at the disciplinary hearing were based on an unsworn complaint and reply of the one witness besides Petitioner to the complained of events, a witness whose whereabouts were unknown to the Disciplinary Committee for at least two and one half years before the Committee disclosed this fact to Petitioner. This failure to disclsoe the unavailability of Ms. Sparber until the

hearings were well under way, and, indeed, the Disciplinary Committee's listing of Ms. Sparber as a witness at the hearing, despite her known unavailability, thereby lulling Petitioner into the reasonable belief that the complainant would be available to cross examine as to the truth of her allegations and her credibility[5] is exactly the type of due process violation abhorred by the courts and which requires this Court's intervention. The coyness of the Disciplinary Committee was a procedural Fifth Amendment due process violation resulting in the substantive Sixth Amendment due process violation of denial of confrontation. *Cf. United States v. Agurs*, 427 U.S. 97 (1976), in which this Court articulated the principle, in the analogous criminal context, that withholding of information which would have created a reasonable doubt constitutes an unconstitutional denial of due process, whether or not the withheld information is specifically requested by the opposing party.[6]

In *Roviaro v. United States*, 353 U.S. 53 (1957), this Court granted certiorari to reverse and remand a judgment of conviction where the party against whom adverse action was taken was denied disclosure of the identity of the one witness to the underlying transaction whose testimony could either amplify or contradict the facts underlying the case against him. In Petitioner's case, a similar situation exists in that Petitioner was constructively prevented from locating a crucial witness to the underlying transactions which were the basis of the disbarment due to a material nondisclosure by the Disciplinary Committee. This Court should grant certiorari to correct this unconstitutional infirmity.

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[5] Complainant's criminal record and past history of suspicious conduct were noted at p. 4, *supra*.

[6] As the Disciplinary Committee erroneously represented to Mr. Malatesta that Ms. Sparber *would* be testifying at the hearings, Mr. Malatesta could not have been expected to request information from the Committee as to *whether* she was available.

V. The Federal Constitutional Questions at Issue were Timely and Properly Raised Below.

In Petitioner's brief submitted to the Appellate Division, First Department, the court of initial review, Petitioner's counsel emphasized the importance of providing due process to Mr. Malatesta at all stages of the proceeding against him. Although at that stage of the case it was not known that the Appellate Division would rely on a *presumption* of unfitness based on the isolated fact of a misappropriation of funds, and therefore a constitutional challenge to such a presumption was not yet made, Petitioner did fully argue that the Committee's failure to provide adequate notice and disclosure of important facts, documents, and evidence amounted to a denial of constitutional rights. The Appellate Division ignored Petitioner's constitutional arguments and implicitly overruled them. *See* Appendix A.

In Petitioner's motion for leave to appeal to the Court of Appeals, Petitioner's counsel raised the issue of the constitutionality of a presumption of unfitness based upon the fact of misappropriation alone, as well as the equal protection problem raised by the disparity of punishment for the same infractions among the Appellate Divisions of the Supreme Court of New York. As this Court noted in *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), quoting from *Morgan v. United States*, 304 U.S. 1 (1938), "the requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." 373 U.S. at 105. Thus, the issues of fundamental fairness, including due process and equal protection, were raised as they emerged in response to the course of the proceedings below. *Id.*

Each of the issues upon which a grant of a writ of certiorari is sought was raised by Mr. Malatesta at appropriate points in the proceedings below in response to constitutional infirmities as such infirmities arose. These due process and equal protection issues were ignored by the Court of Appeals by virtue of its denial of leave to appeal. It is left to this Court to rectify this denial of fundamental constitutional rights.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Dated: New York, New York
June 19, 1987

Respectfully submitted,

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APPENDIX

APPENDIX A

Joseph P. Sullivan, J.P.
John Carro
Sidney H. Asch
Bentley Kassal
Ernst H. Rosenberger, JJ.

In the Matter of Theodore L. Malatesta, (admitted as Theodore Malatesta), an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner, M-4698

Theodore L. Malatesta, (admitted as Theodore Malatesta),

Respondent.

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on June 20, 1960.

In re Theodore L. Malatesta, an Attorney

PER CURIAM:

Respondent Theodore L. Malatesta was admitted to practice as an attorney and counsellor-at-law by this Court on June 20, 1960. At all times relevant, he has maintained an office for the practice of law in this judicial department.

Patricia Smillie-Scavelli, of counsel (Michael A. Gentile, attorney) for the petitioner

Jeremiah S. Gutman, of counsel (Gail A. Wechsler with him on the brief; Levy, Gutman, Goldberg & Kaplan and Albert Felix, attorneys) for the respondent

Petitioner Departmental Disciplinary Committee moves for an order confirming the findings of fact and conclusions of law of a hearing panel, which also recommended disbarment.

On April 19, 1982, respondent, who had been retained to represent Gloria Sparber in the sale of a cooperative apartment, agreed in writing to hold in escrow a check for $4,200. The check was received as a downpayment on the apartment from prospective purchasers, William and Marilyn Cassin, pending approval of the Cassins by the board of directors of the cooperative corporation. On April 19 and 22, 1982, without notifying the Cassins, respondent issued two checks, totalling $1,000, to Sparber, drawn on the escrow account in which he had deposited the Cassin funds. Each of the checks bore on their face the notation "adv. co-op." Thereafter, he converted the bulk of the funds to his own use. He apparently replaced the funds, and on June 8, 1982 repaid the Cassins.

On February 16, 1982, Sparber retained respondent to handle a personal injury action. In September 1982, the insurer for one of the defendants made an offer of settlement in the amount of $6,000. Respondent accepted the offer, signed Sparber's name, without indicating that he was doing so, to a general release running to both defendants, and notarized the signature himself. Upon receipt of the check made payable to both respondent and Sparber, respondent endorsed the check in their respective names, again without indicating that he was signing for her, and deposited it on October 5, 1982 into his escrow account. The balance in the account diminished until the account was overdrawn. On December 9, 1982, Sparber demanded her share of the settlement proceeds, and respondent repaid her with a check drawn on his personal account.

In February and March 1982, respondent deposited into his escrow account two checks, one in settlement of a personal insurance claim and another in settlement of his own injury claim. He had acted as his own attorney in both matters.

The Hearing Panel found petitioner guilty of misconduct involving dishonesty, fraud, deceit, and misrepresentation in violation of DR 1-102(A)(4); conduct prejudicial to the

administration of justice in violation of DR 1-102(A)(5); conduct that adversely reflects on his fitness to practice law in violation of DR 1-102(A)(6); failing to preserve the identity of funds and property of clients in violation of DR 9-102(A); and 22 NYCRR §603.15(a); and improper use of notarial powers in violation of Executive Law §135 and §135-a of the Code of Professional Responsibility, and determined to refer the matter to this Court with the recommendation that respondent be disbarred. One member of the Panel would have recommended a lesser santion, such as a three year suspension, in view of the evidence offered in mitigation.

Absent extremely unusual mitigating circumstances, this court has consistently viewed conversion of funds belonging to a client or third-party as grave misconduct warranting the severe penalty of disbarment. *Matter of Walker*, 113 AD2d 254, 257 (1st Dept, 1985); *Matter of Levine*, 101 AD2d 49, 50-51 (1st Dept, 1984); *Matter of Pinello*, 100 AD2d 64 (1st Dept, 1984). An attorney who misappropriates funds is presumptively unfit to practice law. *Matter of Pressment*, 118 AD2d 270, (1st Dept, 1986), citing *Matter of Marks*, 72 AD2d 399, 401 (1st Dept, 1980).

The record contains ample evidence to support the charges. It was sharply disputed whether Sparber consented to the portion of the handwritten notation included on the copy of the retainer agreement adduced by respondent, but not on the one possessed by the insurance company which settled the personal injury action, which stated " . . . [subject to] full authority to settle, sign release and endorse check, as case was abandoned." However, we agree with petitioner that such a provision, even if agreed to by Sparber, (the hearing panel had found that it was not agreed to) excused neither respondent's conversion of the funds nor his act of notarizing her forged signature on the release in violation of Executive Law §135. Respondent's claim that the conversion was unintentional, and due to naivete and lack of prior experience with the use of a power of attorney, strains credulity. It is belied by the evidence tha he altered his handwriting to resemble Sparber's.

Respondent is fifty-four years of age, has a record as an attorney which is otherwise unblemished, and which includes many instances of public and pro bono service for community and religious organizations. It is not seriously disputed that when respondent misappropriated and commingled the funds in question he was under emotional stress due to legal, administrative, and financial responsibilities thrust upon him when the attorney with whom he shared an office became seriously ill, and other office tenants defaulted on their share of the rent. He also had problems with his daughter, who had dropped out of school and run away from home on several occasions. The stress ultimately manifested itself in chest pains and breathing difficulties, requiring a two day hospitalization in late September 1982. Even on these issues the hearing panel cites several instances in which the respondent's testimony lacked candor.

The psychiatrist who began treating respondent in March 1986 essentially testified that respondent had a passive-aggressive personality with a mixed state of anxiety and depression, and a martyr complex. Based upon this diagnosis, and his interpretation of the hospital records and a note from respondent's personal physician, the psychiatrist opined that psychological stress could have played a role in respondent's poor judgment in a variety of situations.

We agree with petitioner that this testimony was too speculative to furnish an acceptable excuse. It was insufficient to establish the probability that the psychological stress affecting respondent in 1982 so impaired his judgment as to cause the offenses charged. *Matter of Levine, supra; Matter of Wolf*, 73 AD2d 419 (1st Dept, 1980); *Matter of Marks, supra.* Neither respondent's acts of restoring the converted funds, nor his public service, demonstrate such exceptional character as could appropriately be weighed against his disbarment. *Matter of Pinello, supra,* at 65-66.

Accordingly, the motion by petitioner Departmental Disciplinary Committee, for an order confirming the Findings of Fact and Conclusions of Law of the Hearing Panel, with its

recommendation of disbarment, should be granted and respondent's name should be ordered stricken from the roll of attorneys in the State of New York.

Accordingly, the name of respondent is stricken from the roll of attorneys and counsellors-at-law in the State of New York.

All concur.

Order filed.

APPENDIX B

244. MATTER OF MALATESTA, res (Malatesta, ap) -- Motion for leave to appeal denied.

Motion for a stay dismissed as academic.

March 24, 1987